GEORGE KENT (M) BERHAD

v.

STEVEN KOH HON SENG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABU MANSOR BIN ALI J.
[ORIGINATING MOTION NO. R1-25-3 OF 1992]
29 NOVEMBER 1993

INDUSTRIAL LAW: Respondent/claimant given letter of warning for unsatisfactory performance, placed on probation and transferred to original sales position - Claimant claiming constructive dismissal - Industrial Court finding applicant's/company's conduct amounted to repudiation of claimant's contract of employment entitling him to claim constructive dismissal - Company applying for certiorari to quash decision of the Industrial Court - Whether the Industrial Court addressed its mind to the allegation that the claimant had not come with clean hands - Whether the Industrial Court applied the correct test.

The respondent/claimant commenced employment with the applicant/company on 1 October 1975 as a sales representative. On 9 January 1976, the respondent was appointed a marketing executive. Toward the end of 1986, the respondent was asked to promote the sales of a new product but the applicant was dissatisfied with the respondent's performance and also questioned his loyalty. The respondent was given a letter of warning, placed on probation and transferred to his original sales position. Thereafter, the respondent wrote to the applicant claiming constructive dismissal. The Industrial Court found that the applicant's conduct amounted to repudiation of the respondent's contract of employment which entitled him to claim constructive dismissal. The applicant applied for an order of *certiorari* to quash the Industrial Court's decision contending that the Industrial Court had failed to address its mind to the allegation that the respondent had not come to the Court with clean hands based on evidence that the respondent was trading in a rival product.

The question was whether the Industrial Court had applied the correct test or had made any errors in coming to its decision.

Held:

[1] The Court found merit in the respondent Counsel's argument following the case of *Goon Kwee Phoy v. J. & P. Coats (M) Bhd.* [1981] 2 MLJ 129, that parties before the Industrial Court are bound by their pleadings and in determining the fairness of a dismissal the Industrial Court must confine itself to the reason given for the dismissal and the High Court cannot go into another reason not relied on by the employer or find one for it. On the evidence before the Industrial Court no misconduct or conflict of interest was ever pleaded as the reason for the applicant's conduct.

[2] The learned Industrial Court Chairman had correctly decided on the facts that there was a fundamental breach which made it impossible to order reinstatement. The Court agreed with the decision of *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 which decided " as for the Award of compensation, even assuming that the Award contains one or more errors upon its face, the error or errors did not give the High Court jurisdiction to quash the decision of the Industrial Court..."

[Industrial Court Chairman's decision upheld. Application dismissed with costs to the respondent to be taxed. Stay order granted in this matter lifted].

Cases referred to:
Goon Kwee Phoy v. J. & P. Coats (M) Bhd. [1981] 2 MLJ 129 ***(foll)***
Western Excavating (ECC) Ltd. v. Sharp [1978] ICR 221 ***(refd)***
Millbrook Furnishing Industries Ltd. v. McIntosh & Ors. [1981] IRLR 309 ***(refd)***
Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(foll)***

For the petitioner - Ambiga Sreenevasan;T/n.Skrine & Co.
For the 1st respondent - P. Kuppusamy;T/n.P. Kuppusamy & Co.

JUDGMENT

Haji Abu Mansor Bin Ali J:
The brief facts of the case are as follows. The claimant commenced employment with the company on 1 October 1975 as a sales representative at a salary of RM800. By a letter dated 9 January 1976 the claimant was appointed a marketing executive in the Industrial Fittings Division. His job was to promote the sales of such items as pipes, fittings and valves to contractors and Waterworks Department.

Sometime in January 1982, the claimant was transferred to the Marketing Division but still responsible for promoting the sale of above items but to customers in Indonesia. Then by a letter dated 24 March 1992 the claimant was transferred back to the Industrial Fittings Division.

Towards the end of 1986, the claimant was asked to promote the sales of a new product called Fibre Reinforced Polyester Tanks (FRP Tanks) within the Industrial Fittings Division which the company avers is a new job vide para 3 of the statement in reply.

The company contends that because of the claimant's unsatisfactory performance in the marketing of the new product, he was given a letter of warning where his performance was found unsatisfactory and his loyalty to the company was also questionable and the management of the company decided to transfer claimant to a job of handling pipes, fittings, valves etc to contractors. He was also being placed on probation for six months commencing 15 April 1987 on same salary. During that period he was expected to bring collectable sales of RM250,000 per month. As a result of this transfer, he was transferred back to promoting the sales of pipes, fittings and valves, which he had been doing since he joined the company. Then he was on probation and had a sales quota of RM250,000 per month was imposed on him.

The claimant was dissatisfied and in his letter to the company dated 15 April 1987 he claimed he had been constructively dismissed and the company in their letter dated the 21 April 1987 gave their reasons for the action taken. Before the Industrial Court the issue was whether the company's conduct amounted to repudiation of the claimant's contract of employment entitling him to claim constructive dismissal.

Before me the substance of the applicant company's claim is that the Industrial Court failed to address its mind to the allegation that the complainant employee had not come with clean hands and that although constructive dismissal may have been made but properly that finding in fact, should have been affected by a finding that the complainant was himself, on the evidence adduced, guilty of conduct disloyal to the company employing him since it was a fact he traded in Valtek, a product rivalling the company's products.

I find merit in the respondent's Counsel's argument that following the case of *Goon Kwee Phoy v. J. & P. Coats (M) Bhd.* [1981] 2 MLJ 129 which settled the law that parties before

the Industrial Court are bound by their pleadings and in determining the fairness of a dismissal the Industrial Court must confine itself to the reason given for that dismissal and the High Court cannot go into another reason not relied on by the employer or find one for it.

I find it is common ground and I do find on the evidence before the Industrial Court that no misconduct or conflict of interest was ever pleaded as the reason for the company's conduct. This was clear from the evidence of complainant's witnesses. The general manager, marketing and sales and the vice-chairman testified that the alleged misconduct was not the reason for the transfer. What was clear was the alleged misconduct was purportedly committed in 1985. The letter of transfer was some two years later, dated 14 April 1987.

In the disposal of this matter it is settled law that before me is not an appeal. I was being asked to exercise the limited jurisdiction of the Court in a matter of certiorari. We need only ask did the Industrial Court Chairman apply the correct test? Did she commit any error before coming to her decision?

As in the cited case in *Western Excavating (ECC) Ltd. v. Sharp* [1978] ICR 221 the Industrial Court did ask the question whether the employee proved that the employers had been in breach of contract. If the employee failed then he failed in his claim for unfair dismissal. Then the learned Chairman also answered that there was fundamental breach on the evidence before her which made it clear that the employees were not going to be bound by the contract or that their conduct was such as to indicate, from a particular moment, they were not for the future going to be bound by it. In that case the principle that has ben consistently applied is that another Court is not entitled to substitute its own view as to whether it amounted to fundamental breach. This decision appears to have been followed in *Millbrook Furnishing Industries Ltd. v. McIntosh & Ors. (respondents)* [1981] IRLR 309 where the Court held:

> ....and if there was material before the Industrial Tribunal, which would enable them to come to the conclusion that there was a breach, and a repudiatory breach, this Tribunal should not intervene....

I make a finding that the learned Industrial Court Chairman had correctly decided on the facts that there was fundamental breach and she decided it was not possible to order this reinstatement. In the same circumstances, I follow the decision of *Dr. A.Dutt v. Assunta Hospital* [1981] 1 MLJ 304 which so decided "as for the award of compensation, even assuming that the award contains one or more errors upon its face, the error or errors did not give the High Court jurisdiction to quash the decision of the Industrial Court...."

I uphold the learned Chairman's decision and I dismiss this application with costs to respondent to be taxed. The 'stay order' granted in this matter is lifted.